George Lithograph, Brisbane Division *and* Graphic Communications International Union, Local 583, AFL–CIO. Case 20–CA–19301

January 9, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND RAUDABAUGH

On July 16, 1991, Administrative Law Judge James M. Kennedy issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, George Lithograph, Brisbane Division, Brisbane, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Paula R. Katz, for the General Counsel.
Judy S. Coffin and *Maria Narayan (Littler, Mendelson, Fastiff & Tichy)*, of San Francisco, California, for the Respondent.
William A. Sokol (Van Bourg, Weinberg, Roger & Rosenfeld), of San Francisco, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JAMES M. KENNEDY, Administrative Law Judge. This case was heard before me in San Francisco, California, on January 7, 1991, on a complaint issued by the Regional Director for Region 20 of the National Labor Relations Board on November 9, 1984, and pursuant to an unpublished order of the Board dated November 25, 1988. The complaint is based on a charge filed by Graphics Communications International Union, Local 280[1] on October 11, 1984. It alleges that A.G.S. Graphics, now known as George Lithograph, Brisbane Division (Respondent)[2] has committed certain violations of Section 8(a)(5) and (1) of the National Labor Relations Act.[3]

Issues

This case initially began as a test of the certification of representative issued by the Board in the underlying representation case, 20–RC–15697, issued on July 31, 1984. The complaint alleges that since September 28, 1984, Respondent has refused to bargain with the Union. Respondent's answer admits and denies the allegations in part, offers some affirmative defenses, and seeks dismissal of the complaint. As the Board noted in its November 25, 1988 Order, the General Counsel did not file its Motion for Summary Judgment until August 29, 1988.[4]

In its order of November 25, 1988, denying the Motion for Summary Judgment and sending the matter to hearing, the Board specifically prohibited the parties from litigating two issues, employee turnover and the relitigation of matters which could have been litigated in the representation proceeding. That left for me the two remaining issues, whether the certified union, Local 280, continues to exist, and if so whether Respondent's employees have been provided with due process with respect to the merger between Local 280 and Local 3-B. Evidence was taken on both issues, but after the hearing was closed, Respondent, by letter dated February 6, 1991, withdrew its ''lack of continuity'' defense. In essence it agrees that the Union, in its present form, is a continuation of Local 280. Accordingly, the only issue remaining for resolution is whether it was improper of the Union to have denied Respondent's employees any meaningful say in the merger.

Both the General Counsel and Respondent have filed briefs which I have carefully considered. Based on the record and the legal arguments which have been made, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent admits it is a California corporation with a plant located in Brisbane, California, where it is engaged in the lithographic and printing industry. It further admits that during the calendar year 1983 it purchased and received goods and supplies directly from sources outside California valued in excess of $50,000. Accordingly, it admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[1] The caption has been amended, pursuant to the General Counsel's motion, to reflect the current name of the Charging Party. It was changed after Local 280 merged with Bookbinders Local 3-B. Herein, they are collectively called the Union. By granting the motion to amend the caption I do not intend to suggest that the changed caption has any substantive effect on the underlying issues.

[2] At the hearing the parties stipulated that Respondent's correct legal name is George Lithograph, Brisbane Division. The caption has been amended accordingly. The representation petition, Case 20–RC–15697, named the employer as A.G.S. Graphics. In the stipulation for consent election its name was changed to George, A.G.S. Division. The stipulation to correct the name in the instant case is on the representation of Respondent's counsel that the name has been changed during the pendency of the litigation and that the caption should reflect the current name.

[3] On April 2, 1991, counsel for the General Counsel filed a motion to correct transcript. No opposition has been filed and it appears that the corrections are appropriate. Accordingly, the motion to correct the transcript is granted.

[4] The motion and its certificate of service are actually dated April 26, 1985. Apparently the motion somehow became lost and was not received by the Board until August 29, 1988.

II. LABOR ORGANIZATION

Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

Respondent, of course, admits that the certification of representative was issued in favor of the Union's predecessor as alleged. It also admits, and the evidence shows, that it has refused to bargain with the Union in order to test the validity of the certification. See its letter dated September 28, 1984, declining the Union's request to bargain. The only defense before me is whether it is privileged to refuse to bargain with the Union now because the affected employees have been offered no voice in Local 280's decision to merge with Local 3-B. The facts are not in dispute.

In 1985, Local 280 and Local 3-B merged to create the current union, Local 583. Both were affiliates of the same International, Graphic Communications International Union, AFL–CIO. Under the constitution and bylaws of Local 280, only members, retired members, and persons working under one of Local 280's collective-bargaining contracts [i.e., an active employee who had worked under a contract less than 30 days, a financial core member (or possibly an individual working in a bargaining unit who had been denied constitutional membership for some reason)] were permitted to vote on the merger. In order to determine if there were such individuals, the stewards at each of the employers under contract were asked to locate eligible nonmembers so they could be given a ballot. Alena ''Lennie'' Kuhls, Local 583's long-term office manager (who had worked in various capacities for Local 280 and its predecessor for 22 years), testified that both locals had mailed requests to the shop stewards seeking information about eligible nonmembers. She says they could find no such individuals.

She also testified that none of Respondent's employees was eligible to vote on the merger issue because none qualified under the policy. They had not yet become members and did not work for an employer with whom Local 280 had a collective-bargaining contract. Moreover, they could not even become members until they had taken various steps under the union constitution, including filling out an application, being approved by both Local 280's executive board and general membership, attending an indoctrination class, and taking an oath of office. Indeed, those steps only became available to an employee after his/her employer had signed a collective-bargaining contract. Since Respondent was still opposing the certification, its employees had not yet met the first criterion, working for an employer who had a Local 280 collective-bargaining contract. Thus Local 280 did not mail any ballots to Respondent's employees.

At the time of the merger, Local 280 had about 2250 active members and 760 retired members, totaling 3010 eligible voters. According to the official tally, Local 280's members voted in favor of the merger 912 to 387. Since Respondent only had about 74 employees in the unit which had voted in favor of representation by Local 280, even if all had voted against the merger, it still would have passed by a margin of over 450 votes.

Local 3-B's members, totaling 567, voted in favor of the merger 497 to 63. Therefore, no matter what the sentiments of Respondent's employees might have been, they could not have affected the outcome of the merger election.

IV. ANALYSIS AND CONCLUSIONS

Using a mathematical analysis, therefore, Respondent's contention that the employees have been denied a voice in the merger rings hollow. It is only a concern in a hypothetical or theoretical manner. Even if it were the law that these employees were entitled to a voice in the merger, it is doubtful that their denial of the right to vote would considered significant. Respondent does not contend that denying these employees the right to vote in the merger election should void the merger, the most obvious remedy. Instead, it asserts that Respondent should not have to bargain with the merged entity, because its employees had not been given the opportunity to choose the successor. Yet, had Respondent signed a collective-bargaining contract immediately after the certification, its employees would have been given, under Local 280's rules, the right to vote on the merger. Assuming that they all would have voted against the merger, and Respondent thereupon withdrew recognition, such a result would offer Respondent no refuge from an 8(a)(5) complaint. Why, therefore, are its rights any different when a merger occurs which its employees could not have stopped even if they had been eligible to try?

Thus, from an entirely practical standpoint, I fail to see why Respondent should be allowed to duck its bargaining obligation based on what is essentially its disagreement with an internal union rule governing the Union's right to define its own membership rights, duties, and obligations. Even if the rule was somehow illegal, the remedy runs to its employees, not to the employer, and certainly should not insulate the Employer from the collective-bargaining obligation.

But if one departs from the practical and looks only at the law, the law, too, fails to support Respondent's position. In *NLRB v. Financial Institution Employees (Seattle-First National)*, 475 U.S. 192 (1986), the Supreme Court held that the NLRB rule requiring unions in affiliation and merger votes to allow nonmembers to vote, announced in *Amoco Production Co.*, 262 NLRB 1240 (1982), contravened the Act's assumption that stable bargaining relationships are best maintained by allowing the affiliated union to continue to represent the employees. It therefore found the *Amoco* rule to be outside the congressional purpose behind the Act and rejected it. The Board thereafter followed the Court's mandate and discarded the rule, holding that an employer cannot refuse to bargain with the resulting labor organization simply because its predecessors had refused to allow nonmembers to vote on the affiliation or merger question. See *F. W. Woolworth Co.*, 285 NLRB 854 (1987), and *Potters' Medical Center*, 289 NLRB 201 (1988).

Respondent appears to recognize that the law is currently against it, but observes, at the time Respondent challenged the merger, the *Amoco* rule was still in effect. It believes it is entitled to the benefit of the law as it existed at the time. I do not agree. The Supreme Court held that the *Amoco* rule exceeded the congressional policy. If it overstepped in 1986, when the Court so held, it also did so in 1985 when Respondent refused to bargain on that basis. Accordingly, I cannot recommend that it now be given a right which Congress never intended it to have.

Respondent also makes a rather sophisticated argument based on an obscure case, the Board's decision in *Ohio Poly Corp.*, 246 NLRB 104 (1979). That case cannot be relied on. First, it is an amendment of certification petition which falls under somewhat specialized rules only some of which apply here. Second, there is no majority opinion, but consists of three separate opinions by three different Board members who all finally agreed only that the petition should be dismissed. Third, although there is language found in that case by then Chairman Fanning expressing his concern that employees who had been denied membership not by choice or lack of tenure, but by a union constitution provision, were effectively disenfranchised by that provision. They had no voice whatsoever in representational affairs in which they had a direct concern. He refused to amend the union's certification in order to force the union to give them the same voice members would have. While I think such a matter might have been a concern for employees covered by a collective-bargaining contract but denied membership, the employees here have never been covered by a contract and have not yet been offered the opportunity for membership, though membership availability seems to be in the offing.

Moreover, Chairman Fanning's concern about the plight of such employees seems to have been overridden by the Supreme Court in *Seattle-First*. Indeed, *Seattle-First* holds that the Board has ''no authority to prescribe internal procedures for [unions] to follow in order to invoke the Act's protections'' and therefore, ''the Board exceeded its authority under the Act in requiring that nonunion employees be allowed to vote . . . before it would order the employer to bargain . . . .'' In a very real sense, therefore, Chairman Fanning's logic set forth in *Ohio Poly* has been rejected as a basis for Respondent's defense. I, therefore, cannot accept it even as a germinating defense.

Respondent also makes an equitable argument, that the delays which have occurred here are indefensible and have worked to its detriment. I certainly do not condone the fact that the General Counsel's Motion for Summary Judgment became lost and was not submitted to the Board until 1988. Nor do I quite understand all the reasons why the case did not come to trial promptly after the Board denied the Motion for Summary Judgment in November 1988. Even so, I cannot recommend that the case be dismissed on those grounds. It is the Board's responsibility to vindicate public policy. That policy is imbedded in the Act and requires the Board to remedy unfair labor practices. That is particularly important where employees have exercised their right under the Act to be represented by a labor union and that right has become subsequently frustrated by an employer's refusal to bargain. To be sure, Respondent did so here to test the validity of the certification. That tack is part of the statutory scheme.

Nonetheless, the employees have been denied their chosen representation for over 7 years. The Board is obligated to find in their favor, even if it is to Respondent's detriment. Parenthetically, I am not certain that Respondent has made much of a case showing that the delay has actually prejudiced it. Again, its complaint seems mostly hypothetical. It certainly operated its business for that period without having to conform to a collective-bargaining contract. Presumably, since it continues to want to do so, that was a benefit which it derived from its refusal to bargain. Its argument that this delayed procedure has been detrimental to it seems hollow in that context.

Accordingly, I find Respondent to have violated Section 8(a)(5) and (1) as alleged.

V. THE REMEDY

Having found Respondent to have engaged in certain violations of the the Act, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. The affirmative action shall include the standard order that Respondent, on request, meet and bargain in good faith with the Union and, if an understanding is reached, embody that understanding in a signed agreement. In addition, the initial period of certification shall be construed as beginning on the date Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce and in an industry affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization with in the meaning of Section 2(5) of the Act.

3. Since September 28, 1984, by refusing to recognize and bargain with Graphic Communications International Union, Respondent George Lithograph, Brisbane Division has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, George Lithograph, Brisbane Division, Brisbane, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to recognize and bargain collectively in good faith with Graphic Communications International Union, Local 583, AFL–CIO in the following appropriate bargaining unit:

> All production and maintenance employees employed by Respondent at its Brisbane, California, facility; excluding all office employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights as guaranteed by Section 7 of the Act.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with Graphic Communications International Union, Local 583, AFL–CIO regarding the employees employed in the above-described bargaining unit, and, if an understanding is reached, embody that understanding in a signed agreement.

(b) Post at its Brisbane, California facility, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 20, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to recognize and bargain collectively in good faith with Graphic Communications International Union, Local 583, AFL-CIO in the following appropriate bargaining unit:

All production and maintenance employees employed at our Brisbane, California, facility; excluding all office employees, guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain in good faith with Graphic Communications International Union, Local 583, AFL–CIO regarding the employees employed in the above-described bargaining unit, and, if an understanding is reached, embody that understanding in a signed agreement.

GEORGE LITHOGRAPH, BRISBANE DIVISION